No. 83-879

In the Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD P. GRACE, PETITIONER

v.

UNITED STATES PUBLIC HEALTH SERVICE
AND UMBERT HART

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner seeks to recover damages from the government and from his former supervisor in the Public Health Service for a personnel action taken against him while he was a commissioned officer in the Service.

1. Petitioner was a commissioned officer in the Public Health Service, holding the rank of Lieutenant Commander, on a limited, two-year appointment. He was initially assigned to a surgical residency training program. After one year, his participation in that program was terminated and he was reassigned to a different medical program. Pet. App. 7a, 27a. The stated reasons for the reassignment

were petitioner's marginal competence and his inability to get along with others (*id.* at 40a-41a).[1]

According to the allegations contained in the complaint, respondent Hart, who was petitioner's supervisor, initially recommended the reassignment to the Training and Education Committee of the Public Health Service hospital to which petitioner was assigned. That Committee, after considering Dr. Hart's recommendation, also concluded that petitioner should be reassigned, and it forwarded its recommendation to the Executive Committee of the Medical Staff. According to the complaint, the Executive Committee also agreed that petitioner should be reassigned. Petitioner was then invited to appear before the Executive Committee. After hearing him the Committee voted to terminate petitioner's residency, and he was reassigned. Pet. App. 40a-43a.

Another physician who was an official of the Public Health Service subsequently recommended that petitioner be discharged from the Service entirely, but following administrative proceedings the Service determined not to discharge petitioner. He left the Service when his commission expired. Pet. App. 7a, 29a, 43a-46a.

Petitioner brought suit against respondents in the United States District Court for the District of Maryland, seeking a total of $35 million in damages allegedly caused by his reassignment from the surgical residency training program, as well as reinstatement and other equitable relief (see Pet.

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[1]The complaint itself reveals that before his reassignment, petitioner received a poor performance evaluation from a physician who is not a party to this case (Pet. App. 38a); that that physician had also commented on petitioner's inability to get along with his colleagues (*ibid.*); and that petitioner had been involved in what the complaint describes as "an unfortunate incident in which [petitioner] reportedly lost his temper" in dealing with a nurse at a patient's bedside (*id.* at 39a).

App. 50a-52a). He based his claims directly on the Constitution and on the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*

2. The district court transferred one count of petitioner's complaint to the Court of Claims, reasoning that it appeared to present a claim for breach of contract (Pet. App. 17a-21a), but dismissed the remainder of petitioner's claims. The district court ruled that petitioner's FTCA claim was barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which held that servicemen may not sue the United States under the FTCA for alleged torts incident to military service. The district court reasoned that for purposes of the *Feres* doctrine commissioned officers in the Public Health Service should be treated in the same fashion as members of the Armed Forces. Pet. App. 8a-11a. The district court also ruled that the policies underlying the *Feres* doctrine barred petitioner's constitutional damages action against Dr. Hart, and that the constitutional damages action against the United States was barred by sovereign immunity (*id.* at 11a-16a).

The court of appeals affirmed in an unpublished per curiam opinion (Pet. App. 2a-4a). It held that *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), which was decided after the district court's decision, precluded petitioner's constitutional damages action against respondent Hart because petitioner "ha[d] not been deprived of any compensation and administratively he was offered reassignment to another surgical residency program" (Pet. App. 3a). The court of appeals also ruled (*ibid.*) that petitioner's damages claim against respondent Hart was barred by this Court's intervening decision in *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983). Noting that petitioner had disavowed any claim based on breach of contract, the court of appeals reversed the district court's order insofar as it transferred petitioner's

lawsuit to the Court of Claims and remanded for consideration of petitioner's claim for equitable relief (Pet. App. 3a-4a).

3. Petitioner's amorphous complaint was correctly dismissed for several reasons. Petitioner's constitutional claim appears to be that he was denied procedural due process in connection with his reassignment from the residency program (see Pet. App. 32a, 48a). We note that the adequacy of the process petitioner received is apparent on the face of the complaint.[2] But in addition, petitioner's action against the government based on this alleged constitutional violation is barred by sovereign immunity. It is well settled that the United States cannot be sued for damages arising from constitutional violations in the absence of a waiver of sovereign immunity, and—as petitioner appears to concede (Pet. 39-40)—Congress has enacted no waiver of sovereign immunity applicable to petitioner's constitutional claim. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *Radin* v. *United States*, 699 F.2d 681, 684-685 & n.8 (4th Cir. 1983); *Laswell* v. *Brown*, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *Jaffee* v. *United States*, 592 F.2d 712, 717-718 (3d Cir.), cert. denied, 441 U.S. 961 (1979); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); *Norton* v. *United States*, 581 F.2d 390, 393-394 (4th Cir.), cert. denied, 439 U.S. 1003 (1978); *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976).

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[2]While petitioner's complaint alleges at one point that he was denied notice and an opportunity to be heard (Pet. App. 32a), at another point the complaint recites that petitioner did receive notice (*id.* at 41a-42a) and that he was invited by the Executive Committee "to appear and plead his case as to why his residency should not be terminated" (*id.* at 42a).

Petitioner's constitutional damages claim against Dr. Hart (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, supra*) was correctly dismissed because, among other reasons, the complaint nowhere alleges that Dr. Hart was responsible for any alleged constitutional violation. The procedural defects alleged by petitioner—denial of "advance notice of the charges against him, an opportunity to be heard in opposition to the charges, the right to present the testimony of witnesses on his behalf or other pertinent evidence, or to challenge the evidence offered against him" (Pet. App. 32a)—are defects in the procedures allegedly followed by the Training and Education Committee and the Executive Committee. As we have noted, the procedures were not in fact deficient in these ways (see page 4 note 2, *supra*). But in any event, Dr. Hart's only role, according to the complaint, was that he made the initial recommendation that petitioner be reassigned from the residency training program. There is no allegation that Dr. Hart designed, operated, ordered into effect, or in any other way assumed responsibility for the allegedly unconstitutional procedures that the Committees used. Cf. *Parratt* v. *Taylor*, 451 U.S. 527 (1981). Especially in light of this Court's requirement that *Bivens* complaints be pleaded with specificity (see, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978)), petitioner's claim was correctly dismissed.[3]

Petitioner also attempts to challenge his reassignment under the FTCA by asserting that Dr. Hart committed the tort of "abusive discharge" (Pet. App. 60a). It is readily apparent that if this approach were to succeed, any adverse

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[3]To be sure, petitioner asserts that Dr. Hart's "actions were motivated by personal hatred, discriminatory animus * * *, and by a desire to retaliate" (Pet. App. 55a; see *id.* at 56a-57a) and were arbitrary and capricious (*id.* at 48a). But those allegations do not state a constitutional violation.

personnel action taken by the government could be challenged under the FTCA. It has never been thought that the FTCA can be used as a vehicle for routine challenges to adverse personnel actions (see *Bush* v. *Lucas*, slip op. 18-21), and Congress could not possibly have intended that it would be used in this fashion. The tort of abusive or wrongful discharge falls within the exceptions from the FTCA for claims "arising out of * * * interference with contract rights" (28 U.S.C. 2680(h)) and claims "based upon the exercise or performance * * * [of] a discretionary function" (28 U.S.C. 2680(a)).

Finally, we note that every lower court that has considered the issue has agreed with the courts below that the Public Health Service so closely resembles the Armed Forces that under the *Feres* doctrine, commissioned officers of the Public Health Service may not sue the government for torts allegedly committed incident to their employment. See *Alexander* v. *United States*, 500 F.2d 1, 3-4 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); *Hamilton* v. *United States*, 564 F. Supp. 1146, 1148-1150 (D. Mass. 1983); *Levin* v. *United States*, 403 F. Supp. 99 (D. Mass. 1975). These attributes of the Public Health Service are sufficient to bar not only an FTCA action against the United States but petitioner's *Bivens* action against Dr. Hart as well. Compare *Feres* with *Chappell* v. *Wallace*, *supra*.[4]

The *Feres* doctrine and the rule of *Chappell* v. *Wallace* are based on the "peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance

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[4]In addition, petitioner could have sought relief from the Board for the Correction of Public Health Service Records, which, like boards for the correction of military records, has authority to amend any record in order to "correct an error or remove an injustice" (10 U.S.C. 1552, incorporated by reference in 42 U.S.C. (Supp. V) 213a(a)(12)). The decisions of this Board are subject to judicial review. In *Chappell*, the Court viewed the existence of such a remedy as a factor that counselled against the creation of *Bivens* remedy (see slip op. 7).

of such suits on discipline" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954), quoted in part in *Chappell*, slip op. 4; see also *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977)). The statutes Congress has enacted to regulate the Public Health Service reveal that Congress believes that "the relevant conditions of service in the Public Health Service are very similar to those in the armed forces and demonstrate the equally special relationship and need for discipline" (*Alexander* v. *United States*, 500 F.2d at 4). For example, the Public Health Service is defined as one of the nation's "uniformed services," as are the Army, Navy, Air Force, and Marine Corps (42 U.S.C. 201(p)). Commissioned officers in the Service are assigned ranks that have military counterparts (42 U.S.C. 207). Congress has incorporated by reference, in the statutes governing the Service, many of the provisions that govern the benefits and privileges of members of the Armed Forces (see 42 U.S.C. (& Supp. V) 213 and 213a). And in wartime the President can prescribe that the Public Health Service "shall constitute a branch of the land and naval forces of the United States" and that its members shall be subject to the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* (42 U.S.C. 217).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[5]Petitioner even refers to the administrative proceedings that the Health Service instituted against him as a "court-martial" (Pet. App. 31a).